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No. 98-1165

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

BRUCE C. BEREANO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members in all 50 states. The American Bar Association ("ABA") recognizes the NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates. The NACDL was founded in 1958 to promote research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives are to ensure the proper administration of justice and to ensure that criminal statutes are properly construed and applied.

REASONS FOR GRANTING THE WRIT

The questions presented by this case go to the fundamental meaning of the "honest services" amendment to the federal mail fraud statute, 18 U.S.C. § 1346, a commonly utilized statute with potentially unlimited application. The key terms of this twenty-seven word statute are ambiguous in both meaning and scope. Federal prosecutors have seized on this uncertainty in the statute and have wreaked havoc in individuals' lives as the government threatens and brings criminal charges based on an unconstrained view of "honest services." The dangers in such a broad interpretation of Section 1346 – exemplified by the instant case in which Petitioner's conviction stemmed from alleged misstated descriptions in invoices sent to private clients who testified that they had not suffered any harm – is that it effectively sanctions the creation of a federal integrity police.

Such concerns are heightened by the split in the circuit courts of appeals about whether a state law violation must be proved in a Section 1346 case. Absent such a requirement, the constitutional infirmities of the statute are pervasive: fair notice of the prohibited conduct is lacking; courts and prosecutors, as opposed to legislators, are defining the

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1. Counsel for a party did not author this brief in whole or in part and no person or entity, other than the *amicus curiae*, its members, or counsel, have made a monetary contribution to the preparation or submission of the brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court in accordance with Supreme Court Rule 37.2(a) (1998).

proscribed acts; and, contrary to core tenets of federalism, the federal government is free to set standards to govern state and local relationships.

It is essential that this Court define the appropriate breadth of Section 1346 with respect to the statute's application to private relationships and the role state law should play in determining a violation. Only then can the circuit courts of appeals receive much needed guidance as to the meaning and scope of this vague and amorphous statute, and can prosecutors invoke the statute with the consistency and precision that the Constitution mandates. Indeed, this case squarely presents two of the most important issues regarding possible constraints on the reach of Section 1346 – the inapplicability of the statute to private relationships and the requirement of a state law violation to define the reach of "honest services." The substantial and recurring questions presented by Petitioner thus merit this Court's review.

I. THIS COURT SHOULD REVIEW WHETHER SECTION 1346 IS APPLICABLE TO PRIVATE CONTRACTUAL RELATIONSHIPS

The language of Section 1346 is hopelessly ambiguous. Congress left undefined the prohibited conduct – depriving another of the "intangible right of honest services." As a consequence, prosecutors and lower courts have had to resolve questions such as what is an "intangible right;" what are "honest services;" and who is the "deprivor" and the "deprivee" that the statute had been intended to punish and protect, respectively. Resolution by this Court of the breadth of Section 1346 is thus critical.

The possible definitions of the statute's key terms suggest that dishonesty alone may constitute a crime. When applied to private relationships, it enables prosecutors to seek to criminalize every breach of contract or misstatement made in the course of dealing. By its terms, Section 1346 risks metastasizing federal criminal liability by setting standards to govern traditional state and local relationships. Indeed, many of the courts that have struggled with these issues have recognized that application of Section 1346 to the private sector raises "troublesome issues," *United States v. Jain*, 93 F.3d 436, 441-42 (8th Cir. 1996), and poses "special risks." *United States v. Sun-Diamond Growers of California*, 138 F.3d 961, 973 (D.C. Cir.), *cert. granted on other grounds*,

119 S. Ct. 402 (1998); *see also United States v. Cochran*, 109 F.3d 660 (10th Cir. 1997); *United States v. Frost*, 125 F.3d 346 (6th Cir. 1997), *cert. denied*, 119 S. Ct. 40 (1998).

The heightened concern raised by lower courts about utilizing Section 1346 to regulate private relationships stems from, among other things, defining with precision the "honest services" that a private individual is entitled to receive in a transaction. In contrast to relationships in the government context, dealings in the private sector are structured in myriad ways and disparate expectations are brought to bear. Ethereal concerns, such as receiving honest services when no tangible harm has resulted, are typically of scant interest to private parties whose focus is trained largely at a transaction's economic outcome. *See Carpenter v. United States*, 484 U.S. 19, 25 (1987). The difficulty in defining the intangible right of honest services in private relationships is underscored by Petitioner's case in which the "victims," after learning of the government's allegations, testified that they did not suffer any injury and had continued to employ Petitioner.

In the wake of prosecutors seeking to apply aggressively Section 1346 to private relationships, the lower courts have struggled to divine the key terms and breadth of the statute. A number of these courts have broadly applied the statute to the private sector, raising troubling and important threshold issues. It is time for this Court to address and to clarify these basic questions of statutory construction, which recur with great frequency and have a profound impact on individuals' liberty. Indeed, the current lack of precision in Section 1346 raises serious concerns about the constitutional requirement that fair notice be given of the specific conduct that constitutes a crime. *United States v. Lanier*, 117 S. Ct. 1219, 1225 (1997); *see also Fasulo v. United States*, 272 U.S. 620, 629 (1926) (interpreting predecessor version of mail fraud statute, Court cautioned that "[t]here are no constructive offenses; and, before one can be punished, it must be shown that his case is plainly within the statute.").

These fundamental and recurring issues – about which numerous circuit courts of appeals have expressed concern, and that go to the heart of Section 1346 – merit this Court's review.

II. THIS COURT SHOULD REVIEW THE FUNCTION OF STATE LAW IN SECTION 1346 CASES

A broad reading of Section 1346, in which the Federal Government is permitted to set standards for private state and local relationships, implicates core federalism principles. This Court paid heed to similar concerns in *McNally v. United States*, when it held that a broad construction of the mail fraud statute would "leave[] its outer boundaries ambiguous and involve[] the Federal Government in setting standards" governing state and local relationships. 483 U.S. 350, 360 (1987); *see also United States v. Brumley*, 116 F.3d 728, 734 (5th Cir.), *cert. denied*, 118 S. Ct. 625 (1997) (expansive reading of Section 1346 risks "erod[ing] our federalist structure").

These federalism issues are exacerbated considerably by the decision of the court of appeals below that a Section 1346 case need not be predicated on a violation of state law. Petitioner's conviction thus stemmed neither from an underlying state law violation, nor from any federal statutory definition of "honest services." Instead, the prosecutor, unconstrained by any legislature's view of proper ethical conduct, was free to espouse (and obtain a conviction and affirmance based on) a personal view of propriety in a private contractual relationship.

The circuit courts of appeals are sharply divided on the issue of whether there must be proof in a Section 1346 prosecution of a state law violation to establish and define the statutory element of "honest services." *Compare Brumley*, 116 F.3d at 734 ("We decide today that services must be owed under state law and that the government must prove in a federal prosecution that they were in fact not delivered.") *and United States v. Bryan*, 58 F.3d 933, 940 (4th Cir. 1995) ("[T]he fact that a scheme to defraud may or may not violate state law does not determine whether the scheme is within the proscription of the mail fraud statute."). Given the important federalism concerns implicated, this split in the circuit courts of appeals requires resolution.

In addition to federalism issues, other significant constitutional concerns are implicated by this split in the circuit courts of appeals. These potential constitutional infirmities include the following: (1) Absent the constraint of a state law violation in a Section 1346 prosecution, the task of defining the proscribed conduct is left to prosecutors and courts

– an apparent violation of separation of powers principles; (2) Fair notice of proscribed conduct is lacking when the potentially unlimited breadth of Section 1346 – as opposed to well-established principles of state law – form the foundation for "honest services" prosecutions; and (3) The failure of Congress to tether the broad and amorphous language of Section 1346 to an underlying state law violation results in constitutionally excessive authority being vested in federal prosecutors.

The role of state law in Section 1346 cases is thus a critically important issue that merits this Court's review. The need for review is heightened further by the split of authority in the circuit courts of appeals.

CONCLUSION

For all of these reasons, the National Association of Criminal Defense Lawyers urges this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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